LIBRARY
SUPREME COURT, U. S.

FILED
FEB 16 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 10

WHYY, INC.,

Appellant,

v.

BOROUGH OF GLASSBORO

and

DIVISION OF TAX APPEALS OF THE DEPARTMENT OF THE TREASURY OF THE STATE OF NEW JERSEY,

Appellees.

On Appeal from the Supreme Court of New Jersey.

MOTION TO DISMISS APPEAL.

JOHN W. TRIMBLE,
FIELD, TRIMBLE & CLARKE,
Attorneys for Appellee, Borough of Glassboro,
8 Tanner Street,
Haddonfield, New Jersey.

Huntzinger Printing Corp., *Appellate Printers*, Camden, N. J.

INDEX

	PAGE
Jurisdictional Statement	1
Opinions Below	1
Questions Presented	1
Statement of Facts	2
Argument	2
I. This Court should not accept an appeal based on an infringement of a constitutional right unless it was seasonably raised	2
II. The issue of taxing this foreign non-profit corporation after January 1, 1968, is now moot by virtue of N. J. S. A. 54:4-3.6(a)	5
Conclusion	6
Appendix A—New Jersey Supreme Court Rule 1:2-1	6

TABLE OF CITATIONS

CASES:

Louisville etc. R. Co. v. Smith, 204 U. S. 551	4
Radio Station WOW v. Johnson, 326 U. S. 120	4
Railway Express Agency, Inc. v. Commonwealth of Virginia, 282 U. S. 440	5

PAGE

Spies v. Illinois, 123 U. S. 131 4

Thomas v. Iowa, 209 U. S. 258 4

STATUTES:

New Jersey Statutes Annotated 54:4-3.6 .....1, 3, 5

New Jersey Statutes Annotated 54:4-4.4 2

NEW JERSEY SUPREME COURT RULE:

New Jersey Supreme Court 1:2-1 .....3, 4, 6

JURISDICTIONAL STATEMENT.

This is an appeal by WHYY, Inc. ("WHYY") from the judgment of the Supreme Court of New Jersey, entered on July 5, 1967, affirming the judgment of the Superior Court of New Jersey, Appellate Division, denying appellant's petition for tax exemption (App. A of appellant's brief), Appellee, Borough of Glassboro, submits this brief to show that this Court has no jurisdiction of the appeal and a substantial question is not being presented.

OPINIONS BELOW.

The opinion of the Supreme Court of New Jersey is reported at 50 N. J. 6, 231 A. 2d 608 (1967). The opinion of the Superior Court, Appellate Division, is reported at 91 N. J. Super. 269, 219 A. 2d 893 (1966), copies of the opinion are found in Appellant's Appendix.

QUESTIONS PRESENTED.

1. Whether the Supreme Court of the United States has jurisdiction to hear this appeal because of the failure of the Appellant to raise the Federal question until it reached the New Jersey Supreme Court.

2. Whether the question to be considered is substantial inasmuch as all future tax liabilities have terminated subsequent to January 1, 1968, by virtue of the enactment of New Jersey Statute Annotated 54:4-3.6a (1967).

STATEMENT OF FACTS.

Appellee, Borough of Glassboro (hereinafter called "Borough"), agrees with the statement of facts of the appellant with the following additions: The appellant never applied for an exemption pursuant to the procedure as outlined in New Jersey Statutes Annotated 54:4-4.4 but instead, simply sent a letter to the Mayor and Borough Council as set forth in appellant's appendix Exhibit "C". The aforesaid procedure requires the one seeking the exemption to apply to the tax assessor under oath on a specific form as prescribed by the Director, Division of Taxation.

ARGUMENT.

I.

This Court should not accept an appeal based on an infringement of a constitutional right unless it was seasonably raised.

After the exemption was denied by the Borough, the appellant appealed to the Gloucester County Board of Taxation, an administrative body (Appellant's Appendix "C" pages 29-33). The appellant did not raise any constitutional right but simply claimed a tax exemption as a nonprofit and educational institution.

Following an adverse decision the appellant appealed to the New Jersey Division of Tax Appeals. Once again the appellant failed to raise any constitutional right (Appellant's Appendix "C" pages 34-40). This appeal was heard

before Anthony H. Lario, President of the Division of Tax Appeals and is heard as a trial de novo. The opinion of the Court is set forth in appellant's appendix "C" pages 43-47. The sole argument of the appellant was in the statutory construction of N. J. S. A. 54:4-3.6.

Following an adverse decision the appellant filed an appeal with the Appellate Division of the Superior Court. Once again, the appellant failed to raise any constitutional argument. The two questions presented by the appellant in his Appellate Division Brief were:

1. "Is a non-profit corporation organized to provide cultural recreational, and educational radio and television broadcasts, entitled to a tax exemption on its real property in the State of New Jersey."

2. "Is a foreign, non-profit corporation, organized under the laws of the State of New Jersey, entitled to a tax exemption."

The only mention of a constitutional issue is found on page 6 of the Appellant's Brief where it is argued:

> "In light of the above requirements, it is our position that the petitioner is fully subject to legal process under the laws of the State of New Jersey, as if it were originally incorporated in the State of New Jersey, and is, therefore, equally entitled to any exemption under the constitutional provision of equal protection."

The Borough moved to dismiss the appellant's appeal to the New Jersey Supreme Court for failure to raise a constitutional issue prior to that time. (The Appellate Division's decision was unanimous thereby leaving the appellant without a ground for appeal—New Jersey Supreme

Court Rule 1:2-1 (App. A).) The New Jersey Supreme Court said at 231 A. 2d 608, 611:

> "This Court may but need not accept a constitutional question not raised below. *Lettieu v. State Board of Medical Examiners,* 24 N. J. 199, 206, 131 A. 2d 518 (1957). As this constitutional contention is one of great concern to many municipalities and non-profit foreign corporations, the public interest in this question demands that it be decided" (Appellant's App. A p. 21).

It is clear that the New Jersey Supreme Court agreed with the Borough's contention that a constitutional issue had not been raised prior to the appeal to that Court. However, the Court felt the problem of such public concern to waive the rule.

This Court has repeatedly denied appeals which did not seasonably raise the Federal question. *Spies v. Illinois,* 8 S. Ct. 21, 123 U. S. 131, 31 L. Ed. 80; *Radio Station WOW v. Johnson,* 65 S. Ct. 1475, 326 U. S. 120, 89 L. Ed. 2092.

As was stated by this Court in *Thomas v. Iowa,* 28 S. Ct. 487, 209 U. S. 258, 52 L. Ed. 782:

> "A mere claim in the Court below that there has been a denial of due process of law does not of itself raise a federal question with sufficient distinction to give us jurisdiction to consider whether there has been a violation of the Fourteenth Amendment of the Constitution."

And in *Louisville, etc. R. Co. v. Smith,* 27 S. Ct. 401, 204 U. S. 551, 51 L. Ed. 612, this Court said:

> "If a party relies upon a federal right, he must specially set it up, and a denial of liability under the law is not a compliance with that requirement."

It is clear that the appellant first raised the Federal question when it appealed to the New Jersey Supreme Court. This is not in compliance with the prior stated Federal cases and, therefore, not seasonably raised.

II.

The issue of taxing this foreign non-profit corporation after January 1, 1968, is now moot by virtue of N. J. S. A. 54:4-3.6(a).

During the pendency of the various appeals the appellant was successful in having a bill passed in New Jersey Legislature—Chapter 24 of the New Jersey Laws of 1967.

This act now grants the appellant the exemption which was previously denied it by the various Courts of New Jersey and N. J. S. A. 54:4-3.6. Therefore, the question before the Court is based on the petitioner's refusal to pay taxes to the Borough prior to the enactment of the aforementioned legislation.

Deciding this issue will have no significance upon future cases inasmuch as the amount due has been fixed and there is no further liability after January 1, 1968. Furthermore, this Court has held in *Railway Express Agency Inc. v. Commonwealth of Virginia,* 282 U. S. 440, 51 S. Ct. 201, 75 L. Ed. 450 (1931), that a state could require a foreign corporation to become a domestic corporation, in order to do business in Virginia. This holding was reached even though the plaintiff argued that it would lose its diversity status and thereby the use of the Federal Courts.

The State of New Jersey, prior to January 1, 1968 allowed a tax exemption status to non-profit corporations who were or became domestic corporations.

CONCLUSION.

It is, therefore, respectfully submitted that the appeal be dismissed for failure of the appellant to raise a Federal question at the proper time and, furthermore, the question is not substantial.

Respectfully submitted,

JOHN W. TRIMBLE,
Solicitor, Borough of Glassboro.

APPENDIX A.

1:2-1. APPEALS IN GENERAL.

Appeals may be taken to this Court from final judgments:

(a) In causes determined by the Appellate Division of the Superior Court involving a question arising under the Constitution of the United States or this State;

(b) In causes where there is a dissent in the Appellate Division of the Superior Court;

(c) Directly from the trial courts in causes where the death penalty has been imposed and in post-conviction proceedings in such causes;

(d) On certification by this court to the Superior Court, to the county courts and to all other courts pursuant to Rule 1:10; and

(e) In such causes as may be provided by law.